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HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 92 OF 2003.

Dr. Mangla d/o Dinkar
Shankar Shellar,
R/a: 205, Vishnu Bldg.,
N. M. Joshi Marg,
Byculla, Mumbai - 011. ..Appellant.

V E R S U S

Dr. Laxman Ganpat Jadhav,
R/a: "C" Wing, Gagan Mahal,
Sir Pochkhanwala Road,
Near Police Camp,
Worli, Mumbai - 025. ..Respondent.

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Mr. V. G. Parekh for the appellant.

Mr. A. M. Rajabally for the respondent.

CORAM: S.B.MHASE & S.R.SATHE,JJ.

DATE : SEPTEMBER 19, 2006.

ORAL JUDGMENT (Per S.B.Mhase,J.)

1. This appeal is directed against the judgment and decree passed by the Family Court, Bombay at Bandra in Petition No. A-1239 of 1996, on 26.2.2003 wherein the Family Court partly allowed the petition granting decree that the marriage solemnised between the parties on 4.3.1982 is declared void ab-initio under section 11 read with section 5(i) of the Hindu Marriage Act, 1955. By the said judgment,

the prayer of the appellant - petitioner for her maintenance and the maintenance of her son Subodh is rejected. So also the prayer of the petitioner - appellant for granting permanent injunction restraining the respondent from visiting or staying in the premises being Room No. 205, Vishnu Building, N. M. Joshi Marg, Byculla, Mumbai is rejected.

2. When this matter appeared for admission the learned counsel for the respondent - husband raised a preliminary objection in respect of the maintainability of the appeal. The learned counsel for the respondent submitted that in Marriage Petition No. A-1239 of 1996 the appellant - petitioner has prayed for a decree of nullity of marriage solemnised between the petitioner - appellant and the respondent on 4.5.1982 and/or alternatively a decree of divorce, and accordingly prayers have been made in prayer clauses (a) and (b). The learned counsel further submitted that the prayer clauses (c), (d) and (e) are in respect of the custody of minor son Subodh, interim and ad-interim reliefs, while the prayer clauses (f), (g), (i) and (j) are in respect of maintenance for herself and for Subodh and interim relief to that effect. He submitted that since the appellant - original petitioner is a doctor and employed in the government service, her claim for maintenance has been

rejected. So also he submitted that Subodh was born out of the wedlock on 23.8.1983 and therefore on the date of judgment it was noticed by the Family Court that he is major and, therefore, the decree for maintenance of the child has been rejected. Thus, in short he submitted that so far as the prayer clauses (c) to (l) are concerned, the trial Court has rightly found that the appellant - petitioner is not entitled for the said reliefs and rejected the petition. He submitted that out of the prayer clause nos. (a) and (b), namely, a decree for nullity and/or a decree for divorce, the decree for nullity of marriage has been granted under section 11 read with section 5(i) of the Hindu Marriage Act and, therefore there is no cause for the appellant to prefer this appeal. The learned counsel submitted that the highest possible relief permissible under the law has been granted in favour of the appellant - wife and, therefore, the appeal is not maintainable. The learned counsel, who appeared for the appellant has admitted that the appellant's son Subodh was major on the date of passing of the impugned decree and now he is 23 years old and he is a Computer Engineer in USA, and therefore the claim for maintenance of son is not claimed in this appeal. It is also admitted that the wife is employed in government service with the Poddar College of Ayurved and is a practising doctor. She has admitted that she

gets gross salary of Rs.20,060/- and, therefore there is no claim for maintenance. Thus, from the submissions it is revealed that the appellant is not aggrieved by the order of rejection of maintenance to Subodh and to herself. Further, the learned counsel for the appellant submitted that the appellant is aggrieved because the decree under section 12(1)(c) was not passed by the Family Court. The learned counsel for the appellant submitted that the marriage of the appellant with the respondent has taken place when the first wife of the respondent was alive and the said fact was not disclosed by the respondent fraudulently to the appellant, and thereby the appellant was entitled to get a decree under section 12(1)(c), namely the declaration that the marriage of the appellant with the respondent is voidable marriage, since it has been solemnised by fraud committed by the respondent. The learned counsel submitted that thus in addition to the decree passed under section 11 read with section 5(i) of the Act, the appellant is entitled to get a decree under section 12(1)(c) declaring the marriage voidable at her option and being annulled by a decree of nullity. Therefore, he submitted that the appeal is very much tenable and the preliminary objection raised by the learned counsel for the respondent be rejected.

3. Since it is a pure question of law, we intend to decide the preliminary objection in respect of the tenability of the appeal and we are accordingly deciding the preliminary point.

4. The appellant and the respondent, both are doctors and they got married on 4.5.1982, and out of their wedlock, son - Subodh was born on 23.8.1983. It appears that the appellant and the respondent were staying together till 1996. Since by letter dated 26.10.1995, the appellant came to know that the respondent was already married with some other lady prior to the marriage of the respondent with the appellant. She could get the information in the said letter confirmed by May-June 1996 and since then the respondent is not residing with the appellant in Room No. 205, Vishnu Building, N. M. Joshi Marg, Mumbai. According to the respondent, he was forcibly dispossessed, and thereafter the appellant has filed Petition No. A-1239 of 1996 for the reliefs as stated and analysed above.

5. In view of the above facts, it is to be noted that the decree is passed by the Family Court against the respondent - husband holding that the respondent was already married with one Sushila, and said Sushila was alive when the respondent solemnised

marriage with the appellant and thus granted a decree under section 11 read with section 5(i) of the Hindu Marriage Act, 1955. In the backdrop of the above circumstances, the grievance of the appellant is that the said marriage of the appellant was solemnised with the respondent because the respondent - husband fraudulently suppressed the information of his marriage with Sushila and that she was alive at the time of marriage of the appellant with the respondent. Therefore, the learned counsel for the appellant submitted that apart from a decree for nullity of marriage, the Family Court should have granted decree under section 12(1)(c) of the Hindu Marriage Act, namely, the marriage was performed by the respondent fraudulently without disclosing the fact of his first marriage with one Sushila, and thus it should have been declared as voidable marriage at the option of the appellant. That means the appellant wanted a decree under section 11 read with section 5(i) and simultaneously under section 12(1)(c) of the Hindu Marriage Act. Since only decree under section 11 read with section 5(i) has been granted and the decree under section 12(1)(c) has not been granted, the appellant is pressing this appeal.

6. It is to be noted that the Hindu Marriage Act, 1955 provides for different types of decrees.

Under certain circumstances a decree for declaration that the marriage is void ab-initio is possible. Section 11 read with section 5(i) of the Act is one of the circumstances when a decree for nullity of marriage as void ab-initio is to be passed. Herein, in these circumstances the marriage is invalid from its inception and/or it is non-est in law. Another decree that can be granted is that the marriage is voidable at the option of a party making grievance. Such a decree is provided for in section 12 of the Hindu Marriage Act. In this type of decree, whether to treat the marriage as void, is at the option of a party who is making grievance and this marriage is voidable. That means the marriage can be avoided by a party making grievance. Here the marriage can be valid but the party making grievance of fraud and/or want of guardianship or consent, etc is entitled to avoid the marriage. Third category which brings about an end of tie of marriage is the divorce and the said remedy has been provided under section 13 of the Hindu Marriage Act. Here, the marriage is valid but on existence of the circumstances as enumerated in section 13 the marriage is dissolved by a decree of Court, namely, the Court gives a declaration that the marriage is dissolved.

. Thus, three types of decrees in law are

different. First is a nullity of marriage; second is a voidable marriage and; third is a divorce. These are the different remedies provided under the law in different situations and circumstances. In the present matter the respondent was having his first wife - Sushila alive at the time of his marriage with the present appellant. Section 5(i) of the Act requires that either spouse to the marriage shall not have a living spouse at the time of marriage, and if the first spouse of the party is living then the marriage is void ab-initio. In this matter whether the fact of the first marriage was within the knowledge of the second spouse or not, is not a relevant factor. The second marriage may be without the knowledge and/or with the knowledge of the first marriage. Whatever may be the circumstances such second marriage is a void marriage. That marriage does not exist in the eyes of law. It is non-est marriage or it is a nullity. Therefore, this marriage cannot be termed as a marriage fraudulently conducted when the fact of the first marriage is not within the knowledge of one of the parties and/or aggrieved party and a decree under section 12(1)(c) is not possible. The decree of a nullity of marriage is a higher class of decree than the decree for voidable marriage under section 12 of the Act, if we consider their rigours. When the parties are entitled for a higher relief and

the said relief can be granted, a grievance cannot be allowed to be made that a decree of a lower category, namely, a decree for a voidable marriage should have been granted, and therefore admit the appeal. Herein in the present case, the Family Court has rightly granted a decree for nullity of marriage under section 11 read with section 5(i) of the Hindu Marriage Act. Therefore, the appeal is incompetent. Therefore, we accept the preliminary objection.

7. Another ground which has been raised by the learned counsel for the appellant is that the trial Court has recorded a finding that the marriage of the appellant was performed by the appellant with the knowledge of the fact of the earlier marriage of the respondent with Sushila. Learned counsel submitted that this finding is adverse to the appellant and therefore the appellant wants to challenge this finding and therefore the appeal is competent. The said submission is misconceived. The appeal is not competent, because there is a decree of nullity of marriage in favour of the appellant. In short, the decree stands in favour of the appellant even though one of the findings, namely, the fact of knowledge of earlier marriage of the respondent is/was within the knowledge of the appellant, is against the appellant. However, the said finding of fact cannot be challenged

by filing an appeal in the facts and circumstances of the case. Whenever a party who is successful in getting a decree finds that there is an adverse finding recorded against the said party in the judgment, the said party cannot prefer an appeal challenging the decree. The remedy of such party to challenge those findings is by way of cross objection whenever the other party has filed an appeal challenging the decree. But if the other party has not filed the appeal then in that circumstances such findings cannot be challenged by the party like appellant. In the present matter the respondent husband has not challenged the decree passed by the Family Court and therefore the objections to the findings as raised by the appellant cannot be entertained even by way of a cross objection or cross appeal. Therefore, we find that the appeal on that ground is not maintainable.

8. We asked the learned counsel for the appellant that except this is there any challenge which he wants to raise. Learned counsel for the appellant was unable to point out any other point. However, he tried to raise the point in respect of house property. However, we find that that is not the subject matter of the present appeal and/or Family Court petition. Therefore, it cannot be considered in

this appeal.

9. At the fag end the learned counsel for the appellant tried to submit that the point of maintenance of the child survives. However, it was pointed out by the learned counsel for the respondent that the son is 23 years old and he is a Computer Engineer now settled in USA. Taking into consideration all these aspects we do not find that there is any requirement of maintenance to the said child. In view of the age of the child also the said point does not survive.

10. In view of the above facts the appeal is not tenable. The preliminary objection in respect of the maintainability of the appeal is hereby accepted and the appeal is rejected in limine being not tenable.

(S.R.SATHE, J.) **(S.B.MHASE, J.)**